INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	5
Conclusion	21
Appendix	22

CITATIONS

Cases:	
Gaglione v. *United States*, 35 F. 2d 496	16
United States v. *Bailey*, 9 Pet. 236	8, 17
United States v. *Birdsall*, 233 U. S. 223	17
United States v. *George*, 228 U. S. 14	17
United States v. *McDaniel*, 7 Pet. 1	8
United States v. *Morehead*, 243 U. S. 607	8, 17
United States v. *Smull*, 236 U. S. 405	17
Williamson v. *United States*, 207 U. S. 425	17
Statutes:	
Act of June 29, 1906, c. 3592, 34 Stat. 596	6
Act of May 9, 1918, c. 69, 40 Stat. 542 (now § 324 of the Nationality Act of 1940)	11
Act of June 8, 1926, c. 502, 44 Stat. 709	9
Act of March 2, 1929, 45 Stat. 1515	6
Nationality Act of 1940, c. 876, 54 Stat. 1137, as amended, c 534, 60 Stat. 417:	
Sec. 305 (8 U. S. C. 705)	22
Sec. 324 (8 U. S. C. 724)	22
Sec. 327 (8 U. S. C. 727)	11, 13, 23
Sec. 328 (8 U. S. C. 728)	14, 24
Sec. 329 (8 U. S. C. 729)	14, 25
Sec. 333 (8 U. S. C. 733)	5, 9, 10, 16, 26
Sec. 334 (8 U. S. C. 734)	9, 15, 27
Sec. 346 (8 U. S. C. 746)	2, 28
Regulations:	
Code of Federal Regulations:	
Sec. 60.26, 8 C. F. R. (12 Fed. Reg. 5069)	3, 28
Sec. 370.1, 8 C. F. R. (12 Fed. Reg. 5172)	3, 14, 29
Sec. 370.2, 8 C. F. R. (12 Fed. Reg. 5172)	3, 29
Sec. 370.8, 8 C. F. R. (12 Fed. Reg. 5172)	3, 4, 5, 8, 13, 14, 20, 29
Sec. 373.1, 8 C. F. R. (12 Fed. Reg. 5173)	16, 30

930339—51——1

Regulations—Continued — Page
Naturalization, Citizenship and Expatriation Laws, July 1, 1929: Rules and Regulations, Rule 1 — 7
Naturalization Laws and Regulations, June 15, 1924: Rules and Regulations, Rule 3 — 7
Miscellaneous:
Annual Report of the Commission of Naturalization, fiscal year 1923 — 7
Annual Report of the Commissioner of Naturalization, fiscal year 1925 — 7, 9
Annual Report of the Secretary of Labor, 1923, p. 74 — 6
House Committee Print, 76th Cong., 1st sess., Nationality Laws of the United States, Part I — 7, 12
Report of the Secretary of Commerce and Labor, 1907, p. 7 — 6
Report of the Secretary of Labor, 1914, page 79 — 6

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 505

MICHAEL OBERMEIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 245–270) is not yet reported. The opinion of the District Court (R. 230–238) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1950 (R. 271). The petition for a writ of certiorari was filed on January 19, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the regulation prescribed by the Commissioner of Immigration and Naturalization, providing for a preliminary, pre-petition examination under oath of an applicant for naturalization, is authorized by the Nationality Act of 1940.

2. Whether the evidence is sufficient to support petitioner's conviction.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra,* pp. 22–30.

STATEMENT

On September 28, 1948 (R. 2), petitioner, an alien, was indicted (R. 7–8) on three counts charging that on May 26, 1945, June 2, 1945, and June 6, 1946, respectively, he knowingly and falsely stated under oath "in a matter relating to naturalization and citizenship" that he had not at any time been a member of the Communist Party, in violation of Section 346 (a) (1) of the Nationality Act of 1940 (Appendix, *infra,* p. 28). He waived a jury trial (R. 230) and was found guilty by the court on all three counts and sentenced to two years' imprisonment on each, to run concurrently, and fined $1,000 on the first count (R. 188). On appeal to the Court of Appeals for Second Circuit, the judgment was affirmed as to the third count (R. 248–256) but

reversed as to counts 1 and 2 on the ground that prosecution of the offenses charged therein was barred by limitations (R. 257–271).[1]

The facts pertinent to the issues presented by the instant petition may be summarized as follows:

On April 19, 1946, petitioner filed with the Immigration and Naturalization Service Form N–400, entitled "Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization"[2] (R. 82, 227, 231, 237). In conjunction with this application, petitioner was questioned under oath on June 6, 1946, in a preliminary examination conducted by Louis M. Dillon (R. 63–65, 81, 225), a duly appointed naturalization examiner (R. 62–65, 17–19, 194–196, 102, 197, 237) authorized to conduct preliminary examinations and to question, under oath, aliens who had filed Form N–400[3] (R. 62–65, 17–19, 194–196, 102, 197, 237). The oath was administered by Dillon (R. 64, 76, 79–80), and he and petitioner were the only persons present while petitioner was being questioned (R. 77–78).

At this preliminary examination, petitioner, while under oath, was asked by Dillon, "Have

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[1] The Government is filing a petition for a writ of certiorari to review the judgment below in so far as it reversed the convictions on counts 1 and 2.

[2] See 8 C. F. R. 370.1, Appendix, *infra*, p. 29.

[3] See 8 C. F. R. 60.26, 370.2, 370.8, Appendix, *infra*, pp. 28–30.

you ever been a member of the Communist Party," to which he replied in the negative (R. 64, 72–73, 75–76). No stenographic record of the examination was made, but Dillon personally typed in, simultaneously with the examination, notations, showing the results of the examination, on the triplicate copy of Form N–406, "Petition for Naturalization" (R. 64, 65, 71, 77), one of which, under the heading "Attachment tc Constitution", was: "At no time was he a member of the Communistic party" (Govt. Ex. 11, R. 81, 225).

The same day, June 6, 1946, following the preliminary examination, petitioner filed in court his "Petition for Naturalization," Form N–406 (R. 66, 69, 75).

At the trial it was stipulated that petitioner was a member of and affiliated with the Communist Party at all times during the period from 1930 to January 1, 1939 (R. 11–12, 190–191).

The preliminary examination is a purely administrative proceeding and is not one to prove the naturalization petition, which, at the time, has not yet been filed (22, 40–46, 68–69, 75–78, 81, 225, 82, 227); its purpose is to obtain information concerning the applicant's qualifications for citizenship and whether he has complied with jurisdictional requirements (see 8 C. F. R. 370.8, *infra,* p. 29), in order that the Service can (a) advise him as to whether he is qualified for citi-

zenship and, accordingly, whether he should file a petition and, if he concludes to do so, assist him in preparing his petition (40–46, 69, 81, 225), and (b) pass information on to the "designated examiner" (R. 35, 40–46, 65, 68, 76) who later conducts the preliminary "hearing," after the naturalization petition is filed with the court, and makes findings and recommendations to it (R. 22, 35, 40–46). The examiner at the preliminary examination does not make recommendations to the court (R. 35, 46).

ARGUMENT

1. Petitioner contends (Pet. 10–21) that his conviction on the third count cannot stand because there is no statutory authority for the holding of a pre-petition examination under oath of an applicant for citizenship; and that the regulation providing for such examinations (8 C. F. R. 370.8, Appendix, *infra,* p. 29) is inconsistent with Section 333 of the Nationality Act of 1940 (Appendix, *infra,* p. 26), which provides for preliminary hearings before members of the Immigration and Naturalization Service designated by the Commissioner upon petitions for naturalization filed with the courts and for the submission of findings and recommendations by the examiner to the court.

In order properly to evaluate the validity of this contention, it is necessary to examine the pertinent provisions of the Nationality Act and

the regulations thereunder in the light of the history of the administrative examination of applicants for naturalization.

The Bureau of Immigration and Naturalization was established by the Act of June 29, 1906, c. 3592, 34 Stat. 596. While that Act vested the courts with authority to naturalize aliens, it gave the Bureau "charge of all matters concerning the naturalization of aliens" (§ 1) and provided (§ 28) that "The Secretary of Commerce and Labor shall make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this Act."[4] The courts could not adequately inquire into each of the vast number of naturalization cases and, soon after the enactment of this Act, the Bureau began to develop the practice whereby its examiners conducted examinations of applicants for citizenship usually before, but sometimes after, the petition for naturalization had been filed.[5]

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[4] In 1929 the Commissioner of Immigration and Naturalization, with the approval of the Secretary of Labor, was given power to make such rules and regulations. Act of March 2, 1929, 45 Stat. 1515, § 8.

[5] See Report of the Secretary of Commerce and Labor, 1907, p. 7: "These results [prevention of fraud in naturalization cases] are accomplished by means of investigations by the naturalization examiner." Report of the Secretary of Labor, 1914, page 79: "They [naturalization examiners] have also personally investigated, prior to hearings in court, 87,840 petitioners and 169,050 witnesses." Annual Report of the Secretary of Labor, 1923, p. 74: "Under the reorganization plan, all aliens are to be examined before they become

Since 1924 the regulations have continuously provided for pre-petition examinations[6] and, since 1929, have authorized an oath in such examinations.[7] The validity of the regulations providing

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petitioners." Annual Report of the Commissioner of Naturalization, fiscal year 1923, p. 1: "Concretely, this program calls for the establishment of a contact by the field examining force with the applicant for naturalization before he files his naturalization petition, instead of after it." Annual Report of the Commissioner of Naturalization, fiscal year 1925, p. 1: "The applicant is then notified to appear with two witnesses and submit to the administrative examination preliminary to the filing of his petition. In some instances the petition is filed before this examination is made." See also House Committee Print, 76th Cong., 1st sess., Nationality Laws of the United States, Part I, p. 38.

[6] Naturalization Laws and Regulations, June 15, 1924, Rules and Regulations, Rule 3, Subdivision B, Par. 2 (pp. 38–39): "Preliminary forms 2213 and 2214 are designed to elicit the necessary information for the proper execution of a declaration of intention or petition for naturalization. Form 2213 applies solely to declarations of intention and form 2214 to petitions for naturalization. * * * Form 2214, when completed by the alien, shall be forwarded to the proper naturalization examiner, who shall thereupon assist such alien in the preparation of his petition for naturalization on the official form prescribed for the purpose, and such examiner shall examine the alien as to his qualifications for citizenship, interview witnesses, prepare affidavits, and otherwise assist such aliens to fully meet the requirements of the naturalization law." See also the present regulation, 8 C. F. R. 370.8, *infra*, p. 29.

[7] Naturalization, Citizenship and Expatriation Laws, July 1, 1929: Rules and Regulations, Rule 1, "Administrative Officers and their duties," Subdiv. G, "Investigation of naturalization and citizenship matters," Par. 1 (p. 64): "It shall be the duty of the appropriate naturalization officers or

for pre-petition examinations has not previously been challenged.[8] This long history of administrative practice is entitled to weight in appraising the validity of the present regulation. *United States* v. *Morehead,* 243 U. S. 607, 613; *United States* v. *McDaniel,* 7 Pet. 1, 13–15; *United States* v. *Bailey,* 9 Pet. 236, 255–256.

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examiners to investigate thoroughly the qualifications and eligibility of applicants for citizenship and their witnesses * * * to make the necessary reports of all the pertinent facts to the courts. * * *"

Par. 2 (p. 65): "Wherever practicable, preliminary examinations of applicants for citizenship and their witnesses will be made in person. The principal purpose of such examination is to obtain information bearing on the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes * * * Search will be made of the appropriate court and other records in establishing the qualifications of the applicant and the witnesses."

Par. 3 (p. 65): "All material statements of [applicants] for citizenship * * * and their witnesses should be in writing and under oath and signed by applicant or witnesses. * * *"

Cf. *id.*, Subdiv. O, Preliminary hearings under the Act of June 8, 1926, Par. 2: "* * * Each petitioner shall first be duly sworn by the designated examiner or officer * * * The designated examiner shall have before him at the preliminary hearing, the record of the administrative examination in such case. * * *"

See also the present regulation, 8 C. F. R. 370.8, *infra,* p. 29.

[8] The Court of Appeals said: "They were eminently reasonable and appropriate. For the courts, dealing with naturalization, could not have functioned without this administrative assistance" (R. 252–253).

Among numerous recommendations for legislation made by the Commissioner in his Annual Report for the fiscal year 1925 were two separate and distinct ones, the first (p. 25) that the "courts should be authorized to accept the results of the administrative examination by the naturalization examiners and the appearance in the court of the witnesses dispensed with," and the other (p. 26) that "Provision should be made that each applicant should appear in person with his witnesses before the naturalization examiner prior to the filing of his petition for naturalization." Neither recommendation refers to an oath.[9] Subsequently, in the Act of June 8, 1926, c. 502, 44 Stat. 709, Congress adopted the first recommendation, but it took no action on the second. The 1926 Act introduced the provisions, now embodied in Sections 333 and 334 of the Nationality Act, for sworn preliminary hearings before designated examiners [10] upon petitions for naturalization filed with the courts, and for findings and recommendations to the court, which may accept them without further testimony or hearing.

Petitioner argues that in view of the Commissioner's second recommendation referred to above

[9] The opinion below is in error in stating (R. 253) that in the latter recommendation the Commissioner asked for legislative authority for an oath in pre-petition examinations.

[10] While the 1926 Act provided that the courts should designate members of the Service as examiners, the present statute vests such authority in the Commissioner.

and the failure of Congress to adopt it, enacting instead express provisions for post-petition hearings under oath, the statute (i. e., § 333 of the Nationality Act) authorizes only one sworn preliminary examination into the qualifications of the applicant and that the provision of the regulations for a pre-petition examination under oath is inconsistent with and adds to the requirements of the statute (Pet. 13–16).

In the first place, however, we think that petitioner is not warranted in concluding that "Congress refused to authorize a pre-petition examination under oath" (Pet. 15). Prior to the 1926 Act there was no express statutory authority for any administrative examination. As we have shown, *supra,* pp. 6–8, the practice of holding such examinations was developed under the broad administrative authority to promulgate regulations in naturalization matters. In 1926, in dealing with the Commissioner's recommendation that the "courts should be authorized to accept the results of the administrative examination" and dispense with the appearance of the witnesses in court (see p. 9, *supra*). Congress made appropriate provisions regulating the procedure after the court had acquired jurisdiction, i. e., after the filing of a petition for naturalization, by providing for a hearing in proof of the petition before an examiner and for the court's acceptance of the examiner's findings and recommendation. But the fact that Congress was silent as to procedures

prior to the filing of a petition, when it knew from the Commissioner's reports (see fn. 5, p. 6, *supra*) that it had long been the practice of the Service to examine applicants before they filed their petitions, cannot be taken as disapproving such practice. On the contrary, we think that Congress' silence implied a recognition that authority for such examinations already existed.[11]

But regardless of the history of the 1926 act, we submit that the pertinent provisions of the Nationality Act of 1940 show the poverty of petitioner's contention. Section 327 (a) of that Act (*infra*, p. 23) provides that the Commissioner, under the direction of the Attorney General, "shall have charge of the administration of the naturalization laws." Section 327 (b) (*infra*, p. 24) provides in broad terms in its first clause that the Commissioner, with the approval of the

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[11] In this connection, petitioner also relies on the fact that the prior Act of May 9, 1918, c. 69, 40 Stat. 542 (now § 324 of the Nationality Act of 1940, Appendix, *infra*, p. 27) *required* a pre-petition examination of members and former members of the armed forces seeking naturalization (Pet. 12–13, 14). But the fact that Congress required such an examination in such cases is no indication that it thought that the Commissioner had no similar authority in respect of other applicants for naturalization. There was good reason for the pre-petition examination requirement in the 1918 act because that act dispensed with a declaration of intention, a certificate of arrival, and the usual residence requirements, and also because in 1918 pre-petition examinations were not held in every case (see fn. 5, p. 6, *supra*) and were not expressly authorized by the then existing regulations. Express provision for such examinations was first introduced into the regulations in 1924 (see p. 6, *supra*).

Attorney General, "shall make such rules and regulations as may be necessary to carry into effect the provisions of" the act. In its note on this subsection the President's committee on the revision of the nationality laws, consisting of the Secretary of State, the Attorney General, and the Secretary of Labor, took cognizance of the Service's long-standing practice to conduct pre-petition examinations under oath and stated that the rule-making power vested in the Commissioner by Section 327 (b) was intended to continue his authority in this regard (House Committee Print, 76th Cong., 1st sess., Nationality Laws of the United States, Part I, p. 38):

> The first part of this proposed subsection is a continuance of the present statutory authority by which the Commissioner, with the approval of the Secretary of Labor, makes the necessary rules and regulations for carrying the naturalization law into effect (sec. 28, act of June 29, 1906; as amended by sec. 8, act of March 2, 1929, 45 Stat. 1515; U. S. C., title 8, sec. 356).
>
> This subsection would recognize the practice which has been in operation since the basic Naturalization Act of 1906, providing for Federal administrative supervision of naturalization. The primary purpose in authorizing an administrative agency was to insure that an inquiry would be made in every naturalization case as to the eligibility and fitness of the applicant for

citizenship. The courts then and now have no means by which such an inquiry can be made and must rely upon the administrative officers to carry out this important function.

The necessity for the examination into the merits of naturalization applications having been recognized by Congress through the provisions made annually since 1906 to carry on this work, it is important that there be legislative recognition of the fact that it is a necessary safeguard in the granting of citizenship.[12]

The pre-petition sworn examination provided for by the regulation in question (8 C. F. R. 370.8) is calculated to facilitate the efficient administration of the naturalization laws and the

[12] Petitioner argues, on the basis of the second part of Section 327 (b), that since it specifically authorizes the Commissioner to promulgate regulations prescribing the scope and nature of the post-petition examination provided for in Section 333 (a) and limits his authority in this regard, his general rule making authority under the first clause of Section 327 (b) cannot be construed as authorizing the prescription of a pre-petition examination (Pet. 17–20). This argument ignores the fact that Section 327 (b) is in two independent parts joined by the conjunction "and." The first part authorizes such regulations as may be necessary to carry out any and all provisions of the act. As we shall show in the text, the Service has other functions in the naturalization process to which the regulation in question relates. The specific authorization in the second part of the subsection referring to post-petition examinations does not limit the Commissioner's authority under the first part to promulgate regulations which may be necessary and appropriate in the performance of the Service's other functions.

performance of specific duties enjoined upon the Commissioner.

Thus, Section 329 (b) of the Nationality Act prohibits a declaration of intention unless and until the applicant's lawful entry for permanent residence is established and a certificate is issued showing the date, place and manner of his arrival in the United States. In respect of an alien as to whom there is no registry of arrival and who is not ineligible for citizenship, a registry may be made upon a showing, *inter alia,* that he entered the United States prior to July 1, 1924,[13] and is a person of good moral character and is not subject to deportation (§ 328). Upon the making of such a record of registry, a certificate of arrival may be issued "upon application to the Commissioner in accordance with regulations prescribed by the Commissioner" (§ 329 (a)). There is therefore specific statutory authority for regulations governing the procedure upon an application for a certificate of arrival such as petitioner filed with the Service (*supra,* p. 3). The provisions of 8 C. F. R. 370.1 requiring every prospective petitioner for naturalization to file Form N–400, "Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization," and of 8 C. F. R. 370.8 for a preliminary examination under oath touching the applicant's eligibility for citizenship are

[13] Petitioner was admitted for permanent residence in 1923 (R. 191).

reasonable regulations directly related to the performance of the Commissioner's specific statutory functions in issuing certificates of arrival.

There are, moreover, practical considerations supporting the reasonableness of these regulations in the administration of the naturalization laws. Although the ultimate decision rests with the court, the pre-petition examination is designed to elicit information needed by the Service in its determination of the applicant's eligibility for citizenship. It affords an opportunity after questioning the applicant regarding his qualifications thoroughly to investigate and gather evidence concerning them if the examination indicates doubts as to his eligibility. It is important to bear in mind in this connection that the Service represents the United States in naturalization matters and bears the responsibility of making recommendations to the naturalization courts, including, of course, the duty to oppose the petitions of those who are deemed not qualified and to support an adverse recommendation with evidence if need be.[14]

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[14] See § 334 (d) of the Nationality Act (Appendix, *infra*, p. 28):

"The United States shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

In addition, the pre-petition examination enables the Service to advise the alien as to his eligibility for citizenship and whether he should file a petition and to aid him in preparing his petition and in the other steps in the naturalization process.

Finally, the information elicited in the preliminary examination is passed on to the examiner designated to conduct the post-petition hearing to aid him and the court in passing on the petition (see 8 C. F. R. 373.1, Appendix, *infra,* p. 30).

In short, the pre-petition examination is a purely administrative proceeding which serves important purposes in discharging the Service's responsibilities in the administration and enforcement of the naturalization laws. It is distinct from the post-petition preliminary hearing, which is judicial in nature and is conducted by a designated examiner, similar to a referee or special master, whose findings and recommendations the court is authorized to accept as final (§ 333 (b); see *Gaglione* v. *United States,* 35 F. 2d 496 (C. A. 1)).

In view of the administrative purposes subserved by the pre-petition examination which we have outlined above, it is not, as petitioner contends (Pet. 15), a duplication of the post-petition hearing authorized by Section 333. It is not an additional requirement of proof of the applicant's qualifications to become a citizen and the regula-

tion requiring such an examination does not, therefore, add to the requirements of the statute, as did the regulations involved in *Williamson* v. *United States,* 207 U. S. 425, 458–462, and *United States* v. *George,* 228 U. S. 14, upon which petitioner relies (Pet. 7, 16). Cf. *United States* v. *Morehead,* 243 U. S. 607, 614; *United States* v. *Smull,* 236 U. S. 405, 411–412.

These same considerations support the validity of the provision of the regulation that the prepetition examination shall be under oath. Information given under oath is obviously more reliable than unsworn statements. If, as we have shown, the Commissioner is entitled to require such an examination, he is likewise entitled to prescribe an oath to insure that the information sought is true. See *United States* v. *Morehead,* 243 U. S. 604, 614; *United States* v. *Smull,* 336 U. S. 405, 410; *United States* v. *Birdsall,* 233 U. S. 223, 235; *United States* v. *Bailey,* 9 Pet. 236, 255.

2. Petitioner asserts (Pet. 21–24) that although Examiner Dillon testified on direct examination that petitioner answered "no" to the question whether he had ever been a member of the Communist Party (R. 64), Dillon admitted on cross-examination that his direct testimony was his interpretation or conclusion as to the meaning of petitioner's lengthy explanations; that a conviction for perjury may not be based solely on a witness' interpretations and conclusions as to what

was said and that as a matter of law the evidence does not establish that petitioner made the alleged statement. Dillon did not, we submit, make any such admission. He testified that he had no independent recollection of the questions asked of, and the responses made by, petitioner apart from (a) the practice in every case to ask the applicant if he had ever been a member of the Communist Party and (b) his memory as refreshed by Government Exhibit 11, on which he had typed, as he questioned petitioner, "At no time was he a member of the Communistic party" (R. 65–67, 71, 79, 81, 225). He further testified, on direct examination, after refreshing his memory from that exhibit, that he asked petitioner "if he was ever a member of the Communist Party" and that "His answer was 'no' " (R. 64).

Although Dillon did testify, on cross-examination, that he came to the conclusion that petitioner meant that he was not a member of the Communist Party (R. 73) and that petitioner expanded on his views "about his affiliations and about what organizations he belonged to" (R. 72), he did not admit that his conclusion was derived simply from petitioner's lengthy explanations. In fact, he repeatedly asserted, under vigorous cross-examination, that petitioner was asked the direct question as to whether he had ever been a member of the Communist Party and that he replied in the negative (R. 72–74).

In reply to the question, "did you get from Obermeier * * * a rather lengthy explanation to any of the questions that you asked," Dillon stated, "No. There is no general discussion on the idea of Communists at all" (R. 72). To the question, have you "any specific memory of asking the direct question and getting a direct answer," Dillon replied: "He answered in every case—he was asked a direct question, 'Have you ever been a member of the Communist Party,' or, 'Were you a member of the Communist Party'" (R. 73). Dillon's answer to the question, "You wrote the answer from the long explanation that you thought was the answer," was "No, as the result of my question to him, 'Were you ever a member of the Communist Party,' I wrote the answer down, 'No.'" (R. 73). Next following that question Dillon was asked, "Was that what you came to the conclusion of after you got a long explanation from Mr. Obermeier," to which he replied: "No. My conclusion was the result of my direct question to him." (R. 73). Again on redirect examination, Dillon testified that petitioner answered "No" to the question "Have you ever been a member of the Communist Party" (R. 75–76).

Petitioner contends that the evidence is also insufficient to establish that he was placed under oath at the preliminary examination. Dillon testified, however, (a) that he put petitioner under oath (R. 64), and (b) that, although he

had no distinct recollection, at the time of the trial, of administering the oath, it was "the" practice, and "his" practice, to administer an oath in every preliminary examination (R. 79–80).[15]

The trial court, as the trier of the facts, found (R. 238):

> Finally, defendant contends with reference to Count Three, that defendant's guilt has not been proved beyond a reasonable doubt. I have observed Examiner Dillon on the witness stand and his testimony impresses me as being true. After refreshing his recollection from Government's Exhibit 11, which he himself typed as he questioned the defendant and signed, he clearly and unequivocally showed that he placed the defendant under oath and asked him the specific question and received the false answer set forth above. While I draw no conclusion from the failure of defendant to testify, there is no evidence in the record which contradicts Dillon's testimony.

The Court of Appeals thought "the evidence enough to sustain the trial judge's * * * findings" (R. 248). There is therefore no occasion for further review of this question by this Court.

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[15] The regulation (8 C. F. R. 370.8) required that "preliminary examinations of applicants for naturalization * * * shall be made * * * under oath" and this requirement had been in effect for 17 years (see p. 7, *supra*).

CONCLUSION

The decision below is correct and the case presents no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
MURRY LEE RANDALL,
Attorneys.

FEBRUARY 1951.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Nationality Act of 1940, c. 876, 54 Stat. 1137, as amended, c. 534, 60 Stat. 417, provides in pertinent part:

> SEC. 305 (8 U. S. C. 705):
>
> No person shall hereafter be naturalized as a citizen of the United States—
>
> * * * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law; * * *
>
> * * * * *
>
> The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes.
>
> SEC. 324 (8 U. S. C. 724):
>
> (a) A person, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions,

may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service.

SEC. 327 (8 U. S. C. 727):

(a) The Commissioner, or, in his absence, a Deputy Commissioner, shall have charge of the administration of the naturalization laws, under the immediate direction of the Attorney General, to whom the Commissioner shall report directly upon all

naturalization matters annually and as otherwise required.

(b) The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this chapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.

* * * * *

(e) Members of the Service may be designated by the Commissioner or a Deputy Commissioner to administer oaths and to take depositions without charge in matters relating to the administration of the naturalization and citizenship laws. In cases where there is a likelihood of unusual delay or of hardship, the Commissioner or a Deputy Commissioner may, in his discretion, authorize such depositions to be taken before a postmaster without charge, or before a notary public or other person authorized to administer oaths for general purposes.

SEC. 328 (8 U. S. C. 728):

(a) The Commissioner shall cause to be made, for use in complying with the re-

quirements of this chapter, a registry of each person arriving in the United States after the effective date of this Act, of the name, age, occupation, personal description (including height, complexion, color of hair and eyes, and fingerprints), the date and place of birth, nationality, the last residence, the intended place of residence in the United States, the date and place of arrival of said person, and the name of vessel or other means of transportation, upon which said person arrived.

(b) Registry of aliens at ports of entry required by subsection (a) of this section may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner, in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, that such alien—

(1) Entered the United States prior to July 1, 1924;

(2) Has resided in the United States continuously since such entry;

(3) Is a person of good moral character; and

(4) Is not subject to deportation.

(c) For the purposes of the immigration laws and naturalization laws an alien, in respect of whom a record of registry has been made as authorized by this section, shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of such alien's entry.

SEC. 329 (8 U. S. C. 729):

(a) The certificate of arrival required by this chapter may be issued upon appli-

cation to the Commissioner in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, upon the making of a record of registry as authorized by section 328 of this Act.

(b) No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person's lawful entry for permanent residence shall have been established, and a certificate showing the date, place, and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner or a Deputy Commissioner to cause to be issued such certificate.

SEC. 333 (8 U. S. C. 733):

(a) The Commissioner or a Deputy Commissioner shall designate members of the Service to conduct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court. For such purposes any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpena witnesses, and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner's witnesses.

(b) The findings of any such designated examiner upon any such preliminary hearing shall be submitted to the court at the final hearing upon the petition with a recommendation that the petition be granted, or denied, or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate

lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner. The judge to whom such findings and recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of such lists shall thereafter be filed permanently of record in such court and the duplicate list shall be sent by the clerk of such court to the Commissioner.

SEC. 334 (8 U. S. C. 734):

(a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant, and, except as provided in subsection (b) of this section, the witnesses shall be examined under oath before the court and in the presence of the court.

(b) The requirement of subsection (a) of this section for the examination of the petitioner and witnesses under oath before the court and in the presence of the court shall not apply in any case where a designated examiner has conducted the preliminary hearing authorized by subsection (a) of section 333; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath

before the court and in the presence of the court.

* * * * *

(d) The United States shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

SEC. 346 (8 U. S. C. 746):

(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—

(1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.

The pertinent regulations under the Nationality Act are:

SEC. 60.26, 8 C. F. R. (12 Fed. Reg. 5069):

Authority to administer oaths and take depositions. All patrol inspectors, immigrant inspectors, naturalization examiners, and officers of the Immigration and Naturalization Service of a higher grade are hereby authorized to administer oaths and to take depositions without charge in mat-

ters relating to the administration of the naturalization and citizenship laws.

SEC. 370.1, 8 C. F. R. (12 Fed. Reg. 5172):

Preliminary form; to whom sent. Each prospective petitioner for naturalization shall be required to fill out properly and sign preliminary application Form N–400 and submit it, with three photographs as prescribed in Part 364 of this chapter and the applicant's declaration of intention if required, to the immigration and naturalization office prescribed in sec. 60.30 (a) of this chapter.

SEC. 370.2, 8 C. F. R. (12 Fed. Reg. 5172):

Notification to appear and file petition for naturalization. Following the submission of the preliminary Form N–400, as described in sec. 370.1, the applicant will be notified when and where to appear to file the petition for naturalization.

SEC. 370.8, 8 C. F. R. (12 Fed. Reg. 5172):

Preliminary naturalization examinations; facts to be ascertained; manner of conducting and uniformity; limitation. Wherever practicable, preliminary examinations of applicants for naturalization and their witnesses shall be made in person and under oath. The applicant and each witness shall be interviewed separately and apart from one another. The purpose of such examinations shall be to obtain accurate and material information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law; is mentally and morally qualified

for citizenship; is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the United States.

SEC. 373.1, 8 C. F. R. (12 Fed. Reg. 5173):

(a) Preliminary hearings conducted under section 333 of the Nationality Act of 1940 shall be open to the public. Wherever possible, a member of the Service other than the person who conducted the preliminary examination, shall serve as designated examiner. Preliminary hearings shall be conducted in person by the designated examiner, or officer, and the petitioner and his witnesses shall be present. The petitioner and witnesses shall first be duly sworn. The designated examiner shall have before him at the preliminary hearing the record of the preliminary examination in each case. He shall not, however, be limited to the information contained in such record, but may use any material evidence or data received from any other source; and he may present and examine other witnesses than those produced by the petitioner. * * *

* * * * *

(d) The designated examiner or officer shall prepare in triplicate his findings and recommendations for presentation to the court on Forms N–480 or N–481 for petitions recommended to be granted, on Form N–483 for petitions recommended to be continued, and on Form N–484 for petitions recommended to be denied. These findings and recommendations shall be signed by the officer in attendance at the final hearing and submitted to the judge of the court at or before the final hearing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 505

MICHAEL OBERMEIER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

SIDNEY E. COHN,
PAUL O'DWYER,
Attorneys for Petitioner,
1776 Broadway,
Borough of Manhattan,
New York, N. Y.

CONTENTS

	PAGE
Opinion Below	1
Argument	1
Conclusion	7
Appendix	9

Cases Cited

Williamson v. United States, 207 U. S. 425 ..... 2, 6

United States v. George, 228 U. S. 14 ..... 2, 6

Statutes and Regulations Cited

Nationality Act of 1940:

- Section 327(b) 2, 6
- 8 U. S. C. Section 727(b) 2, 6
- 8 U. S. C. Section 733 ..... 3, 5

8 C. F. R. Sections 361.1-362.14 5

8 C. F. R. Section 363.6 5

8 C. F. R. Sections 370.1 et seq. 5

8 C. F. R. Section 370.8 5

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Opinion Below

The opinion below of the Court of Appeals has now been reported at 186 F. (2d) 243.

ARGUMENT

I

Although the Government takes the position that the petition for certiorari herein should be denied, the fifteen pages of its brief devoted to elaborate and tenuous argu-

ments to justify the decision of the Court below are in striking contrast to this conclusion. In short, the Government's brief in opposition demonstrates two things: First, that the case is of great importance in the administration of the naturalization laws, and, second, that the question here involved has never been authoritatively decided.

II

In attempting to find statutory authority for the oath here in question, the Government has completely abandoned the principal ground upon which the Court of Appeals based its decision that the oath was authorized by law.

The Court of Appeals held (R. 254-5) that the oath was authorized by the *second* clause of the first sentence of Section 327(b) of the Nationality Act of 1940 (8 U. S. C. Section 727(b)), which authorizes the Commissioner to "prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts."

The Government has specifically conceded (in footnote 12 on page 13 of its brief in opposition) that this provision is one "referring to post-petition examinations."

III

As far as statutory authority for the oath is concerned, the Government now relies solely on the Commissioner's general rule-making power contained in the *first* part of Section 327(b) of the Nationality Act (see pp. 11-14 of the Government's brief in opposition). But to sustain this argument, in view of the decisions of this Court in the cases of *Williamson* v. *United States,* 207 U. S. 425 and *United States* v. *George,* 228 U. S. 14, the Government finds itself obliged to establish (Br. 16-17) that the oath here in question, which was administered in a pre-petition preliminary examination, does not duplicate the oath in the

post-petition hearing specifically prescribed by Congress in Section 333 of the Act (8 U. S. C. Section 733).

The Government attempts to do this by trying to show that the pre-petition examination under oath "is calculated to facilitate the administration of the naturalization laws and the performance of specific duties enjoined upon the Commissioner" (Br. 13-14). Thus the Government argues that the pre-petition examination under oath serves four purposes:

1. That it "affords an opportunity after questioning the applicant regarding his qualifications thoroughly to investigate and gather evidence concerning them" (Government's brief, p. 15).

2. That it is "directly related to the performance of the Commissioner's specific statutory functions in issuing certificates of arrival" (Government's brief, p. 15).

3. That it "enables the Service to advise the alien as to his eligibility for citizenship * * * and to aid him in preparing his petition", etc. (Government's brief, p. 16).

4. That "the information elicited in the preliminary examination is passed on to the examiner designated to conduct the post-petition hearing to aid him and the Court in passing on the petition" (Government's brief, p. 16).

None of these arguments has any merit.

1. The evidence adduced by the Government shows that the preliminary examination under oath prior to the filing of a petition is not used as the basis of any investigation and gathering of evidence with respect to the petitioner's qualifications. That evidence establishes that the investigation of petitioners is made *after the post-petition hearing under oath* conducted by a designated examiner in accordance with Section 333 of the Act (8 U. S. C., Section 733). It also shows that the usual practice is to hold the pre-petition examination under oath and the post-petition

hearing under oath on the same day, so that it would obviously be impossible to conduct any investigation based on the pre-petition examination prior to the holding of the post-petition hearing.

Milton H. Salomon, the designated examiner who questioned petitioner on May 26 and June 2, 1945, when called as a witness by the Government, testified upon direct examination as follows (R. 21-22):

> "Q. When you were acting as designated examiner and prior to your commitment on your duties as investigator what were your duties generally when acting as designated examiner? * * * A. I conducted preliminary hearings held in connection with petitions for naturalization filed by aliens.
>
> "*Thereafter* I would direct the investigation which was to be made and would make a recommendation to the naturalization court as to whether or not such petition should be finally granted or denied.
>
> "Q. *Your investigation followed the filing of the petition for naturalization?* A. *That is correct.*
>
> "Q. And the preliminary examination that is held is something different from a preliminary hearing, is it not? A. That is correct.
>
> "Q. The preliminary examination is held at the time the petition is sworn to, is that correct? A. It precedes the filing of the petition. It is held by the preliminary examiner and thereafter the petition is filed with the court and then the designated examiner conducts his preliminary hearing. *They are all done on the same day as a rule*, although there are exceptions" (italics supplied).

2. The preliminary examination under oath prior to the filing of a petition is not used as the basis for the issuance of certificates of arrival.

In its argument on this point, the Government attempts to confuse the issues by making reference to aliens as to whom there is no registry of arrival. In the case of such aliens, the regulations provide an elaborate procedure, entirely different from the pre-petition examination here involved, whereby they may be placed upon the registry

of aliens and receive a certificate of lawful entry (8 C. F. R. Sections 362.1-362.14). And 8 C. F. R. Section 363.6 specifically provides that where an applicant for a declaration of intention or a petition for naturalization is without record for his lawful entry, he shall be advised to apply for registry in accordance with that procedure.

8 C. F. R. Sections 370.1 et seq. apply only to prospective petitioners who either do not need certificates of lawful entry or already have them. Accordingly, at the time when an application for a petition (Form N-400) is filed, the furnishing of a certificate of arrival or of lawful entry is a mere ministerial act as to which an oath is not appropriate. The applicant for naturalization has already established either that he is entitled to such certificate or that he does not need one. The procedure set forth in 8 C. F. R. Sections 370.1 et seq. clearly is not for the purpose of establishing the petitioner's right to a certificate of arrival. Indeed, Section 370.8 of the regulations, under which the preliminary pre-petition examination here in question was conducted, shows on its face that it has nothing to do with certificates of arrival but rather is concerned with the applicant's qualifications to become a naturalized citizen.

3. The oath administered in the pre-petition examination is obviously unnecessary in aiding the alien in preparing his petition, etc. Insofar as the pre-petition examination is for the purpose of aiding the alien, no oath is appropriate because it is the alien's interest, rather than that of the Government, that is involved and that might be prejudiced by the making of a false statement.

4. The preliminary pre-petition examination under oath cannot be justified on the ground that the information there elicited is passed on to the designated examiner, who holds the post-petition hearing pursuant to Section 333 of the Act (8 U. S. C. Section 733). As we have already indicated, the record establishes that the two examinations

are generally held on the same day. We have shown in our main brief in support of our petition that the two examinations cover the identical subject matter. First, the petitioner is questioned under oath as to his qualifications *prior* to the filing of his petition and then, forthwith, usually on the same day, he is questioned under oath again as to his qualifications *after* his petition has been filed. No useful purpose is served by the pre-petition examination under oath in these circumstances. All it does is to duplicate the post-petition hearing under oath for which Congress has expressly provided. In so doing, it is inconsistent with the statute, and under the doctrine of the *Williamson* and *George* cases, *supra,* cannot be used as the foundation of a prosecution for perjury.

In an attempt to draw a distinction where there is no real difference, the Government argues that the post-petition hearing is a *judicial* proceeding and that the pre-petition examination is an *administrative* proceeding. But this is just playing with words. It does not avoid the duplication which vitiates the oath upon which petitioner's conviction was based. The Government, thus, has failed in its effort to show that the pre-petition examination under oath facilitates "the efficient administration of the naturalization laws and the performance of specific duties enjoined upon the Commissioner."

IV

In connection with the legislative history of the Nationality Act of 1940, the Government argues (at pp. 11-13 of its brief in opposition) that "the President's committee on the revision of the nationality laws * * * took cognizance of the Service's longstanding practice to conduct pre-petition examinations under oath and stated that the rule-making power vested in the Commissioner by Section 327(b) was to continue his authority in this regard." To sustain this argument, the Government quotes (Br. 12-13) an excerpt from the note to Section 327(b) written by that Committee.

We contend that this note, when read in its entirety, clearly shows:

1. That it has no reference whatever to pre-petition examinations.

2. That it refers to post-petition hearings upon the basis of which recommendations are made to naturalization courts.

3. That its purpose was to manifest an intention that such post-petition hearings be uniform throughout the United States.

For the convenience of the Court, we are printing the full text of the note as an appendix to this brief.

Conclusion

It is respectfully submitted that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

Sidney E. Cohn,
Paul O'Dwyer,
Attorneys for Petitioner.

APPENDIX

President's Committee on the Revision of the Nationality Laws

Note to Proposed Section 327(b)

(House Committee Print, 76th Cong., 1st Sess., Nationality Laws of the United States, Part 1, p. 38)

The first part of this proposed subsection is a continuance of the present statutory authority by which the Commissioner, with the approval of the Secretary of Labor, makes the necessary rules and regulations for carrying the naturalization law into effect (sec. 28, act of June 29, 1906; as amended by sec. 8, act of March 2, 1929, 45 Stat. 1515; U. S. C., title 8, sec. 356).

This subsection would recognize the practice which has been in operation since the basic Naturalization Act of 1906, providing for Federal administrative supervision of naturalization. The primary purpose in authorizing an administrative agency was to insure that an inquiry would be made in every naturalization case as to the eligibility and fitness of the applicant for citizenship. The courts then and now have no means by which such an inquiry can be made and must rely upon the administrative officers to carry out this important function.

The necessity for the examination into the merits of naturalization applications having been recognized by Congress through the provisions made annually since 1906 to carry on this work, it is important that there be legislative recognition of the fact that it is a necessary safeguard in the granting of citizenship.

While the Constitution requires a "uniform" rule of naturalization, the fact that more than 2,000 Federal and State courts have naturalization jurisdiction, and the lack of any statutory provision by which the Immigration and

Naturalization Service might prescribe the scope and nature of the examination to be accorded petitioners for naturalization, have resulted in much inconsistency, confusion, and contrariety of opinion and decision in this field. There have been wide differences of opinion among the many courts as to the nature and extent of the examination which applicants for naturalization should be given, and such differences even among the various naturalization judges in a single court. There has also been at times a lack of agreement as between the judges and naturalization examiners. As it is hopeless to expect that the judges of the more than 2,000 courts, all of coordinate jurisdiction, would, acting independently, be able to arrive at a type of examination which would be uniform throughout the United States, it is suggested that the Commissioner of Immigration and Naturalization be authorized to prescribe the scope and nature of such examination. This would not only place the authority where it must in any event be normally exercised but would have the great merit of providing for a uniform test throughout the United States and in all of the naturalization courts.

It is felt, however, that there should be definite assurance that such examination would be confined to the essential elements necessary to be considered in determining the fitness for citizenship of any applicant. The proposed measure, therefore, specifies that such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and the other qualifications to become a naturalized citizen as required by law. The administrative examination would not, of course, prevent further interrogation of petitioner and witnesses by the court. (See comment in sec. 332.)

While the statutory authority which is now given naturalization examiners to conduct preliminary hearings, take testimony, and make recommendations to the court for the

admission or denial of petitions filed in the United States district courts, is a move in the direction of a more uniform naturalization law, a test which would be the same in every court throughout the United States would give a tremendous impetus in approaching the required uniformity of procedure.

The confidence the judiciary reposes in the members of the Naturalization Service is indicated by the acceptance by the judges of United States district courts of the recommendations of the naturalization examiners based upon their hearings before the courts, in 99 percent of all cases submitted. These cover approximately 800,000 cases since 1926, when Congress authorized this procedure.